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Supreme Court of the United States

OCTOBER TERM, 1949.

STATE OF OHIO, EX REL. CALVIN BEVIS,
Petitioner,

vs.

GEORGE L. COFFINBERRY, RICHARD W. MORSE AND WILL T. BLAKE, AS MEMBERS OF THE INDUSTRIAL COMMISSION OF OHIO,
Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

This is a petition by Calvin Bevis for this court's writ of certiorari to review a judgment and opinion of the Supreme Court of Ohio rendered in this cause on April 20, 1949.

JURISDICTION.

The jurisdiction of this court to review the question herein presented is invoked under Section 237 (b) of the Judicial Code of the United States as amended (28 U. S. C., 344). The judgment of the Supreme Court of Ohio which was entered on April 20, 1949, became final on May 4, 1949 upon the denial of the application for rehearing. The right of the petitioner to due process of law as guaranteed to him by the Fourteenth Amendment of the United States Constitution was especially set up and claimed at every stage of the proceedings below.

STATEMENT OF FACTS.

The Supreme Court of Ohio sustained a general demurrer to a petition in mandamus filed by petitioner in that court against the respondents. The court based its decision on the ground that the payment of compensation to employees who have incurred occupational diseases is limited in Ohio to certain enumerated types of diseases. State, ex rel. Bevis, v. Coffinberry, 151 O. S., 297. The legislature of Ohio made all occupational diseases compensable effective October 12, 1945 by enacting Section 23 of the Ohio General Code 1465-68a. The petitioner claimed his rights under such amendment before the Industrial Commission, and alleged the same in his petition, argued it in his brief, and orally before the Supreme Court of Ohio. Petitioner says he was denied due process of law by both the Industrial Commission and the Supreme Court of Ohio by their refusal to apply the amendment.

All of the evidence introduced by the parties before the Industrial Commission stated that the petitioner was

permanently and totally disabled. No evidence to the contrary was introduced. The Industrial Commission and its subordinate boards substituted opinion for evidence and found the petitioner was "not totally disabled due to his silicosis." This violated the petitioner's right to a fair hearing as guaranteed to him by the Fourteenth Amendment of the United States Constitution, and constituted a gross abuse of discretion, and all of which was alleged in the petition in the lower court.

QUESTIONS PRESENTED.

(1) Does the Fourteenth Amendment of the United States Constitution require that the Industrial Commission and the Supreme Court of Ohio apply the Workmen's Compensation Act as amended by the legislature and which became effective prior to the time petitioner's claim was filed with the Industrial Commission?

(2) Does it constitute a gross abuse of discretion for the Industrial Commission and its subordinate boards to exceed their jurisdiction by arbitrarily refusing to weigh evidence, to classify occupational disease according to the usual and accepted medical classification, and to substitute opinion for evidence in violation of petitioner's right to a fair hearing as guaranteed to him by the Fourteenth Amendment of the United States Constitution?

SPECIFICATION OF ERRORS TO BE URGED.

(1) The Supreme Court of Ohio erred in denying due process of law to the petitioner by not applying the Amended Workmen's Compensation Law in considering the sufficiency of petitioner's allegations in his pleading in the mandamus action.

(2) The Supreme Court of Ohio erred in not performing its judicial duty of holding the Industrial Commission to the standards of fair play necessary to protect the constitutional right of petitioner to due process of law, and which standards were outlined by the United States Supreme Court in St. Joseph Stockyards Co. v. U. S., 298 U. S., 38, and Morgan v. U. S., 298 U. S., 468, 304 U. S., 1—and which cases were cited in petitioner's application for rehearing in the Ohio Supreme Court.

Wherefore, petitioner prays that this petition for a writ of certiorari issue to the Supreme Court of Ohio for the purpose of reviewing the question hereinbefore specified.

ROBERT EMMETT BROOKS,
LOUIS C. CAPELLE,
ROBERT E. L. YOUNG,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the court below was officially reported in 151 Ohio State, 293.

The jurisdiction of this court to review the questions herein presented is invoked under Section 237 (b) of the Judicial Code of the United States as amended (28 U. S. C., 344). The right of the petitioner to due process of law as guaranteed to him by the Fourteenth Amendment of the United States Constitution was especially set up and claimed at every stage of the proceedings below.

The Supreme Court of Ohio sustained a general demurrer to petitioner's petition in mandamus against the respondents in that court. The Supreme Court of Ohio as well as the Industrial Commission failed to apply the amendment to the Workmen's Compensation Law which made all occupational diseases compensable in Ohio, and which went into effect prior to the time petitioner's claim was filed with the Industrial Commission of Ohio. The petitioner had alleged that the Industrial Commission and its subordinate boards had failed to meet the standards required by due process of law and had departed from fair play by substituting opinion for evidence, by arbitrarily refusing to consider material evidence and to properly classify petitioner's occupational disease, and by reaching a conclusion not supported by the evidence but based solely on conjecture. The Supreme Court of Ohio erroneously held this did not constitute a gross abuse of discretion. The petitioner had no other legal remedy than mandamus.

FIRST SPECIFICATION OF ERROR.

The Supreme Court of Ohio erred in denying due process of law to the petitioner by failing to apply the Amended Workmen's Compensation Act in considering the sufficiency of petitioner's pleading in the mandamus action.

The Supreme Court of Ohio said in its opinion, 151 Ohio State, p. 296:

> "The payment of compensation to employees who have incurred occupational diseases is limited in this state to certain enumerated types of disease."

The Ohio General Code Section 1465-68a after listing a schedule of 22 compensable occupational diseases was amended effective October 12, 1945 by addition of the following provision:

> "Sec. 23. All Other Occupational Diseases. (A disease peculiar to a particular industrial process, trade or occupation and to which an employe is not ordinarily subjected or exposed outside of or away from his employment.) All conditions, restrictions, limitations, and other provisions of this section, with reference to the payment of compensation or benefits on account of silicosis, shall be applicable to the payment of compensation or benefits on account of any other occupational disease of the respiratory tract resulting from injurious exposure to dusts."

The legislature of Ohio has made all occupational diseases compensable under certain conditions. Lamneck's

Ohio Workmen's Compensation Practice Manual, page 83.

The fundamental principle recognized by all civilized governments is, that no person shall be deprived of his substantive rights except as the matters are determined by the law of the land. Murray v. Hoboken Land Co., 18 How. (U. S.), 272. A valid legislative enactment should be given effect by the Industrial Commission and the Supreme Court of Ohio; and not treat such an amendment as a nullity where petitioner has claimed rights thereunder.

The petition in mandamus contained the allegation: "Relator says that **Section 23** as well as Section 22 of General Code 1465-68, were in effect at the time the employer filed original notice OD 1-22 with the respondents." Petitioner was denied due process when the above section was held to be meaningless.

SECOND SPECIFICATION OF ERROR.

The Supreme Court of Ohio erred in not performing its judicial duty of holding the Industrial Commission to the standards of fair play necessary to protect the constitutional right of petitioner to due process of law, and which standards were outlined in St. Joseph Stockyards Co. v. U. S., 298 U. S., 38, and Morgan v. U. S., 298 U. S., 468, 304 U. S., 1, cited in petitioner's application for rehearing in the court below.

Exhibit A attached to petitioner's pleading in the lower court was made a part thereof. It shows the waiver of a physical examination by the Industrial Commission by the self-insuring employer, who submitted the report of its own examiner in lieu thereof. This evidence agreed with that of plaintiff as to the extent of petitioner's disability, namely, that the petitioner was **permanently** and was the extent of the disability. There was no evidence **totally** disabled. All evidence introduced agreed that introduced to the contrary. The Industrial Commission and its subordinate boards substituted opinion for such evidence and made a finding that the petitioner was not totally disabled. This finding was based solely on conjecture and had no foundation in the evidence. Nothing can be considered evidence which is not introduced as such, and the Supreme Court of the United States so held in the cases cited in petitioner's application for rehearing.

If the determination of fact is based on no evidence at all, or upon evidence so unsubstantial that it is deemed equivalent to no evidence, judicial review may be had, for due process requires that the determination be based

upon substantial and legally competent evidence, and whether there is such evidence is a question of law.

Walker v. San Gabriel, 20 Cal., 2d, 879, 129 Pac., 2d, 349;
Bridges v. Wixon, 326 U. S., 179, 65 S. Ct., 1443.

If there is no reasonable ground to justify a decision by an officer or board other than one way, and there was a failure to so act, the mandamus is broad enough to compel the making of such a decision.

State, ex rel. Coffey, v. Chittenden, 112 Wis., 569, 88 N. W., 587.

Procedural due process guarantees a judicial consideration of constitutional facts.

Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S., 287, 40 S. Ct., 527;
St. Joseph Stockyards Co. v. U. S., 298 U. S., 38.

He who decides must hear. The agreed evidence as introduced was that the petitioner was permanently and totally disabled. This evidence should have been considered controlling, and not disregarded because the Industrial Commission's opinion happened to be different.

Morgan v. U. S., 298 U. S., 468, 304 U. S., 1;
Deter v. Ind. Acc. Comm., 45 Cal. A., 2d, 664.

The opinion of the Ohio Supreme Court would render the reports of examining physicians introduced in evidence valueless, and permit the Industrial Commission to arbitrarily and unreasonably substitute its own opinion for the same although they did not examine the claimant.

Any substantial departure from fair methods of procedure may be considered as an excess of jurisdiction.

Morgan v. U. S., 298 U. S., 468, 304 U. S.,1;
Boswell Co. v. Ind. Acc. Comm., 67 Cal. A., 2d, 347.

The petitioner alleged in his pleading that the silicosis referees did not consider the clinical findings of the attending physician; and that the respondents arbitrarily refused to make the silicosis referees classify the silicosis. The lower court in its opinion herein, 151 O. S., p. 297 states:

> "Failure to so classify the silicotic condition indicates that there may not have been sufficient consideration of the facts presented to the referees."

Petitioner claims that this departure from fair methods of procedure was in excess of the jurisdiction of the Industrial Commission, and violated his constitutional right to due process of law.

An abuse of discretion is defined as:

> "A discretion exercised to an end or purpose not justified by and clearly against reason and evidence."

The petition in the court below alleged facts constituting a very gross abuse of discretion, the refusal of the Industrial Commission to apply the Amended Workmen's Compensation Act of Ohio, the arbitrary refusal of respondents to consider material evidence, the arbitrary refusal to classify the occupational disease, and that the finding of the commission was without support in the evidence, was against all of the evidence, and was based solely on conjecture.

The Supreme Court of the United States in St. Joseph Stockyards Company v. United States states in 298 U. S., page 74, that the court may set aside the order of an administrative tribunal for any error of law, for lack of findings necessary to support the order, or because findings were made without evidence to support them; or because the evidence was such that it was impossible for a fair-minded board to come to the result which was

reached, or because facts and circumstances which ought to have been considered were excluded from consideration.

CONCLUSION.

The petitioner having come into court in the only manner open to him, and having stated facts in his petition showing the Industrial Commission committed errors of law, exceeded its jurisdiction, and grossly abused its discretion, it became the judicial duty of the Supreme Court of Ohio to protect the petitioner's constitutional rights and not leave such rights at the mercy of administrative officials.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 216.

STATE OF OHIO, EX REL. CALVIN BEVIS,
Petitioner,

vs.

GEORGE L. COFFINBERRY, RICHARD W. MORSE AND WILL T. BLAKE, AS MEMBERS OF THE INDUSTRIAL COMMISSION OF OHIO,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The opinion of the court below was officially reported in 151 Ohio State, 293.

Petitioner invokes the jurisdiction of this court to review the question herein presented under Section 237 (b) of the Judicial Code of the United States as amended (28 U. S. C., 344).

STATEMENT OF THE CASE.

This is an action in mandamus in the Supreme Court of the state of Ohio in which Calvin Bevis, as claimant in a matter pending before the Industrial Commission of the state of Ohio, filed his petition (R., 2, 3, 4, 5, 6) in that court asking for a writ of mandamus directing these respondents, as members of the Industrial Commission of Ohio, to allow his application for additional compensation beyond the date of last payment and award compensation for permanent total disability caused by silicosis.

On demurrer the petition was dismissed by said Supreme Court, and application for rehearing denied (R., 2).

QUESTIONS PRESENTED.

1. Does a denial by the Supreme Court of Ohio of a writ of mandamus which does not question the validity of Section 1465-68a, pars. 22 and 23 of the General Code of Ohio but merely seeks to compel respondents to determine a question of fact in favor of petitioner, challenging only the "decision" of respondents as to the compensability of the claim in question, properly raise a substantial federal question whereby this court may take jurisdiction on petition for a writ of certiorari?

2. Is the denial of an application for additional compensation by the Industrial Commission of Ohio and the subsequent refusal of the Supreme Court of Ohio to require the Industrial Commission to revoke such denial a deprivation of petitioner's right to a fair hearing as guaranteed him by the Fourteenth Amendment to the Constitution of the United States?

LAW AND ARGUMENT.

I. Denial of a writ of mandamus by the Supreme Court of Ohio, which writ seeks to compel the Industrial Commission of Ohio to determine a fact question in favor of petitioner and does not challenge the validity of Section 1465-68a, pars. 22 and 23 of the Ohio General Code does not properly raise a substantial federal question so as to enable petitioner to invoke the jurisdiction of the Supreme Court of the United States to review the decision on petition for writ of certiorari.

(A) The Very Basis of Petitioner's Claim For Compensation For Occupational Disease is the Validity of Section 1465-68a of the General Code of Ohio.

The creation of the Industrial Commission of Ohio and the authority vested in said Industrial Commission is found in Article II, Section 35, of the Constitution of the state of Ohio which reads as follows:

> For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith,

shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all rights of claimants thereto. Such board shall set aside as a separate fund such proportion of the contributions paid by employers as in its judgment may be necessary, not to exceed one per centum thereof in any year, and so as to equalize, in so far as possible, the burden thereof, to be expended by such board in such manner as may be provided by law for the investigation and prevention of industrial accidents and diseases. Such board shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employes, enacted by the General Assembly or in the form of an order adopted by such board, and its decision shall be final; and for the purpose of such investigations and inquiries it may appoint referees. When it is found, upon hearing, that an injury, disease or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen per centum of the maximum award established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease, or death, and

paid in like manner as other awards; and, if such compensation is paid from the state fund, the premium of such employer shall be increased in such amount, covering such period of time as may be fixed, as will recoup the state fund in the amount of such additional award, notwithstanding any and all other provisions in this constitution.

(As amended. Effective Jan. 1, 1924. 110 O. L., 631.)

There was no common law right of action for such occupational disease in Ohio except as the result of the employer's negligence; and there was no statutory provision for claims or rights of action in Ohio for occupational disease prior to the enactment of Section 1465-68a of the General Code of Ohio.

Renkel v. Industrial Commission, 109 O. S., 152;
Industrial Commission v. Brown, 92 O. S., 309;
Industrial Commission v. Cross, 104 O. S., 561;
Industrial Commission v. Roth, 98 O. S., 34.

(B) The Question of Constitutionality Was Not Raised in a Proper Proceeding in the Supreme Court of Ohio.

Petitioner sought by mandamus to compel respondents to determine a question of fact in favor of petitioner, challenging only the "decision" of the respondents with respect to the compensability of the claim in question.

Thus, the prayer of the petitioner before the Supreme Court of Ohio was (R., 6):

"Wherefore, the relator prays for a writ **directing** the Industrial Commission to **allow** relator's application for additional compensation beyond the date of last payment and **award** relator compensation for permanent total disability caused by silicosis. * * *" (Emphasis added.)

Judge Matthias, in rendering the opinion for the Supreme Court of the state of Ohio said (R., 15):

> "The question presented to this court by the facts alleged in the petition involves the determination of a purely medical question of fact. The determination of such a question as the relator presents here, that is whether the complicating diseases of pulmonary emphysema and asthmatic bronchitis were caused by the silicosis condition, is so clearly a question of fact that the granting of a writ by this court would be in effect a requirement that the industrial commission determine a question of fact in the manner in which this court believes it should have been found and determined. It is clear that there was a positive difference of opinion between the medical authorities constituting the silicosis referees and the medical board of review of the industrial commission on the one hand and the physicians who examined the relator on the other. In such a situation the relator obviously does not show a clear right to relief by way of mandamus and under the well established rule such a writ will not issue."

II. The denial of an application for additional compensation by the Industrial Commission of Ohio and the subsequent refusal of the Supreme Court of Ohio to require the Industrial Commission to revoke such denial is not a deprivation of petitioner's right to a fair hearing as guaranteed him by the Fourteenth Amendment to the Constitution of the United States.

To what extent the Fourteenth Amendment operates to restrict the constitutionality of legislative policies of the states has been the subject of wide discussion in the various courts throughout the country. However, there has been no attempt by the various courts to define in a few words what is meant by the term "due process of

law". Cooley in his "Constitutional Limitations, 8th Ed. (page 741), defines it as follows:

> "Due process of law in each particular case means, such execution of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights."

In Walker v. Sauvinet, 92 U. S., 90, the court, at page 93, stated:

> "Due process of law is process according to the law of the land. This process in the state is regulated by the state."

In the case of Reetz v. Michigan, 188 U. S., 505, the court held:

> "There is no provision in the federal Constitution forbidding the state from granting to a tribunal, * * * the final determination of a legal question. Due process of law is not necessarily judicial process."

While the Industrial Commission of Ohio belongs to the administrative branch of the state government it has, under the authority vested in it by Section 35 of Article II of the Constitution of Ohio, many of the attributes of a court of justice, and exercises, in the administration of the workmen's compensation system, a quasi-judicial power. It is composed of three members, who are constantly engaged in hearings, the taking of testimony, listening to arguments and reading briefs of counsel, rendering judgments, styled awards, and writing opinions. It is a tribunal of vast importance to the people of the state.

In the case of Hurtado v. People of California, 110 U. S., 516, Mr. Justice Matthews, after an exhaustive re-

view of the authorities on the subject of due process of law, stated at page 535:

> "Due process of law in the latter refers to that law of the land, which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each state, which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure. 'The Fourteenth Amendment,' as was said by Mr. Justice Bradley in Mo. v. Lewis (supra), 'does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. * * *'"

CONCLUSION.

It results from the rules announced in the foregoing authorities, to the facts appearing on the record in the case at bar, that petitioner has failed to raise a substantial federal question and has not shown any denial of due process.

Respectfully submitted,

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